MASS. J3.2: M46

MEDIATION IN MASSACHUSETTS
An Opportunity for Increasing Efficiency and Effectiveness in Dispute Resolution:

Report of Research on Statutes, Proposed Legislation and Remaining Legal and Policy Issues Concerning Mediation in Massachusetts

January, 1991

COLLECTION
SEP 24 1991
University of Massachusetts
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Prepared by: Julie K. Hilton, J.D., M.B.A.
207 Washington St.
Gloucester, MA 01930
(508) 281-2211

Prepared for: Albie M. Davis
Director of Mediation
Administrative Office of the District Court
Holyoke Square, Salem, MA 01970
(508) 745-9010

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TABLE OF CONTENTS

Introduction	3
I. Mediation - What, Why and Where?	3
A)What is Mediation?	3
B) Why Mediate?	3
C) Where Does Mediation Occur in Massachusetts?	5
II. Massachusetts Statutes Relating to Mediation	6
III. Proposed Legislation in Massachusetts Relating to Mediation	8
IV. Remaining Legal Issues Concerning Mediation in Massachusetts	10
A) Is Mediation Constitutional?	10
B) Is a Mediated Agreement Legally Binding upon the Parties?	13
C) Is a Mediator a Mandated Reporter?	13
D) Are There or Should There Be Limitations to Confidentiality?	14
E) Does Mediation Present Statute of Limitations Problems?	14
F) Do Mediators Have Any Liability to Disputants, and if so, What Is It?	15
V. Remaining Policy Issues Concerning Mediation in Massachusetts	15
A) Should Use of Mediation in Courts Be Expanded and How?	15
B) How Should Mediation Be Funded?	19
C) Should the Commonwealth Promulgate Standards and Licensing Certification Requirements for Mediators?	20
Conclusion	22

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Introduction

One of the primary functions of government throughout the ages has been the resolution of disputes. Whether the dispute resolver was a king or a judge, large expenditures of time and tax dollars have been applied to the management of conflict among citizens. In order to increase the efficiency and effectiveness of dispute resolution, the federal government and numerous state governments have begun offering mediation in addition to adjudication as a dispute resolution method in the courts as well as in administrative agencies. *See State Legislation on Dispute Resolution*, American Bar Association Standing Committee on Dispute Resolution (1988).

This report will first define mediation, describe its benefits, and discuss the use of mediation in Massachusetts (Part I); next outline Massachusetts statutes and proposed legislation relating to mediation (Parts II and III); and then identify some of the remaining legal and policy issues concerning mediation in Massachusetts (Parts IV and V). Florida's mediation statute will be discussed as an example of how one state legislature has provided a statewide comprehensive court mediation program. The discussion of legal and policy issues is only intended as a brief overview to stimulate further research, assessment and discussion among legislators, judges, court administrators, mediators, attorneys and other dispute resolution professionals and policymakers about where we are and where we want to go in the development of mediation in the Commonwealth.

I. Mediation - What, Why, and Where?

A) What is Mediation?

Although not defined by statute in Massachusetts, in practice, mediation is an informal, nonadversarial, process where a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between parties without prescribing what it should be. The role of the mediator includes, but is not limited to, assisting the parties in identifying the issues, determining their common interests, and exploring settlement alternatives; reducing obstacles to communication; stimulating meaningful and orderly discussion, analysis and negotiation between the parties (and their counsel, if present); and finalizing a settlement agreement. In contrast to a judge or an arbitrator who decides for parties how a dispute will be resolved, a mediator's objective is to help parties reach their own mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. A mediator does not give opinions, make judgments, hear testimony, examine evidence, rule on facts or law, grant awards, or render decisions.

B) Why Mediate?

The primary benefits of mediation include:

Increased Efficiency and Significant Savings of Time and Money. Over 85% of the cases mediated in Massachusetts result in a settlement agreement by the parties. By referring cases to mediation rather than spending thousands of taxpayers' dollars for a trial by a judge or jury, mediation provides the opportunity for more expedient, less costly and more efficient resolution of disputes. Whereas the average mediation lasts three hours, many trials last days or weeks and cost the taxpayers and the parties significant time and monies.

Opportunities for Empowerment and Self-Determination of Individuals. If efficiency were the only consideration, arbitration might be more a more preferable dispute resolution method than mediation. A mediator's primary role, however, is to encourage the parties to exercise their autonomy and independent choice in deciding whether and how to resolve their dispute. Thus mediation carries the added benefit of providing individuals with opportunities for empowerment and self-determination. *See* Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 Fla. L. Rev. 253 (1989).

More Durable Agreements and Increased Compliance. People are more likely to abide by their own decisions rather than decisions imposed on them. Therefore, in comparison to adjudicated resolutions, mediated agreements are more durable and the compliance rate is extremely high. Each case that does not return to the court for relitigation or other services represents considerable savings to both the parties involved and the Commonwealth.

Allows Parties to Tailor Settlement Terms to Their Individual Needs. Whereas a judge is limited to granting money judgments and certain equitable remedies, the parties are only limited by their creativity in reaching settlement terms that satisfy more of their individual interests and needs and make win-win agreements. Mediation is conducted in an informal, private, confidential setting so that the parties may fully explore their mutual problems without the formal rules of evidence enforced at trial and without risk that what they say will be used against them in the adversarial process. Also, since the only public record of a mediation is what the parties agree to file as their settlement agreement in the court docket, parties to a mediated agreement can preserve their privacy.

Can Evoke Recognition of Common Humanity in the Face of Bitter Conflict. Mediation is unique in that it creates an atmosphere for parties to come to understand each others' problems, thoughts and feelings. Even when parties have significantly different views of a dispute, they have the opportunity in mediation to recognize their common humanity in the face of their bitter conflict. *Id.* at 270-73.

Preserves the Right to Trial if Voluntary, Mutually Agreeable Settlement is Not Reached. If parties are unable to resolve their dispute through mediation, their constitutional rights to trial are preserved and they can proceed to court to have a judge resolve it for them. Mediation is sometimes referred to as "nonbinding" because it provides the flexibility for parties to proceed with adjudication if they do not voluntarily reach a mutually agreeable solution to their conflict. Technically, mediation by definition is nonbinding because the decision-making authority rests with the parties. Of course, once a valid settlement agreement is reached, the parties should be bound just as they would under any other contract.

The value of mediation was well summed up by several judges. One federal judge stated that he would use alternative processes like mediation "even if I had no docket problem at all." Hon. Richard Enslen, U.S. District Court for the Western District of Michigan, Remarks at Workshop on Identifying and Measuring the Quality of Dispute Resolution Processes and Outcomes, Univ. of Wisconsin-Madison (July 13-14, 1987). The reason echoed by other judges in explaining their practice of encouraging mediation is the superior quality of a mediated agreement. Bush, *supra*, at 273. "In most cases, the

absolute result of a trial is not as high a quality of justice as the freely negotiated, give a little, take a little settlement." Will, Merhige & Rubin, The Role of the Judge in the Settlement Process, in Proceedings of Seminar for Newly Appointed United States District Judges, 75 F.R.D. 89, 203 (1976).

C) Where Does Mediation Occur in Massachusetts?

Massachusetts has been a leader over the past fifteen years in community mediation and mediation in the District Court, the Boston Municipal Court, the Housing Court, the Probate and Family Court, and more recently in the Superior Court and administrative agencies of the Commonwealth. Thirty-five Massachusetts community based nonprofit mediation programs comprised largely of volunteers provide mediation services in matters including small claims, CHINS and other parent-child conflicts, landlord-tenant cases, divorce and child custody disputes, minor criminal complaints and victim offender reconciliation, as well as in disputes among students in schools. Mediation for civil cases is also offered in the Superior Courts for Suffolk, Middlesex and Hampden counties.

The Massachusetts Mediation Service (renamed the Office of Dispute Resolution in 1990 legislation) assists with mediation programs in the courts, including the Superior Court and Land Court, and public adiministrative agencies, such as the Department of Environmental Protection, the Executive Office of Communities and Development, the Department of Public Utilities, and the Commission Against Discrimination. Also, the Department of the Attorney General actively supports mediation in the courts, community and schools. Family Service Officers in the Probate and Family Court mediate domestic relations cases upon referral by presiding judges. In addition, a growing number of private mediators with varied educational and training backgrounds and experiences are offering mediation services to the Massachusetts public.

While mediation has significantly improved the dispute resolution climate in the courts, communities, administrative agencies and schools where the process has been introduced, there are numerous opportunities to expand the role of mediation in Massachusetts. In order to determine how we can better use mediation in the Commonwealth to streamline the resolution of disputes, it may be helpful to examine the statutes currently in effect, proposed legislation, and remaining legal and policy issues concerning mediation in Massachusetts.

II. Massachusetts Statutes Relating to Mediation

The following is a summary of the Massachusetts statutes currently in effect which relate to mediation:

Cite*	Topic
A) Mass. Gen. L. ch. 233, s. 23C (1985)	**Confidentiality of mediator work product and communications during certain mediations** (Work product and communications in presence of mediator with certain training and either experience or affiliation with particular dispute resolution organizations is confidential and cannot be disclosed in judicial or administrative proceedings involving parties to mediation. Not applicable to labor disputes).
B) Mass. Gen. L. ch. 218, s. 43E (1988)	**District Court Community Mediation Advisory Board** (Created advisory board on mediation in district court department, including training and standards for mediators and use of funds).
C) Mass. Gen. L. ch. 211B, s. 19 (1990)	**Authorizing establishment of ADR program for trial court in civil actions** (Chief Administrative Justice may establish and promulgate rules for mandatory nonbinding alternative dispute resolution program for civil actions within the trial court subject to approval of Supreme Judicial Court).
D) Mass. Gen. L. ch. 150, s. 10A (1985); Mass. Gen. L. ch. 150E, s. 9 (1990)	**Confidentiality of work product of mediator to labor dispute** (Mediator to labor dispute is not required to reveal information acquired in mediation to any administrative, civil or arbitration proceeding).
Mass. Gen. L. ch. 150E, s. 9 (1990)	**Mediation upon determination of impasse in labor disputes** (Procedure for mediation of labor disputes upon formal determination of impasse in negotiations, and if impasse continues after mediation, there is procedure for fact-finding proceedings and arbitration). [A portion of Chapter 150E, s. 9 relating to arbitration was amended in 1990].
Mass. Gen. L. ch. 23C, ss. 1 - 4 (1981)	**Board of Conciliation and Arbitration** (Creates within Executive Office of Labor a Board of Conciliation and Arbitration for the resolution of labor disputes, provides for appointment and membership of the board, and provides that the chairman may appoint and remove mediators).
E) Mass. Gen. L. ch. 166A, s. 16 (1971)	**Mediation by Community Antennae Television Commission** (CATV Commission shall employ mediation in making decisions between cities and towns involved in conflicts regarding CATV systems).

Cite*	Topic
F) Mass. Gen. L. ch. 119, ss. 51A, B (1989)	**Mandated reporting of child abuse by certain persons** (Requires certain persons, including workers in health-related, counselling and school facilities to report conditions giving reasonable cause to believe that a child under eighteen is suffering serious physical or emotional injury from abuse. ***Does not expressly include mediators as mandated reporters and it is uncertain whether Legislature intended their inclusion).***
G) Mass. Gen. L. ch. 218, s. 35A (1978)	**Notice and hearing before issuance of process on complaints of misdemeanors made in District Court** ***(Does not expressly refer to mediation, but minor criminal or potentially criminal matters are screened in 35A hearings and referred to mediation).***
H) Mass. Gen. L. ch. 7, ss. 4G, 51 (1991)	**Office of Dispute Resolution enabling legislation** (Selected portions of the Budget Act of FY 1991 amend ch 7. The enabling legislation: formalizes the existence of the Office of Dispute Resolution (ODR) within the Executive Office for Administration and Finance (which replaces the Massachusetts Mediation Service that has operated as a pilot project for 5 years); authorizes the ODR to provide various dispute resolution services; allows it to charge fees and receive grants to be financially self-sufficient; and allows it to promulgate rules).
I) Mass. Gen. L. ch. 218, s. 22 (1989); Mass. Gen. L. ch. 221, s. 62B (1978); Mass. Gen. L. ch. 221, s. 62C (1985) [Standard 6:01, Standards of Judicial Practice, Small Claims (1984)]	**Mediation in Small Claims matters** (Authorizes and directs clerk-magistrate's office to inform plaintiffs that Small Claims actions may be mediated at the request of either party and with the agreement of both parties). [Standard 6:01 Commentary states that although not specifically provided for by statute or rule, many courts successfully utilize the services of others besides magistrates to act as mediators].
J) Mass. Gen. L. ch. 209A, s. 3 (1991)	**No court shall compel mediation in cases involving complaints for protective orders against domestic abuse** [Included in Act Relative to Protection of Abused Persons, Acts of 1990, ch. 403, s. 3]. (Although the court may refer a case involving complaints of abuse among family household members to the family service office of the probation department or victim/witness advocates for information gathering purposes, the court shall not compel the parties to mediate or meet together).

*Copies of cited statutes are available upon request from the author or the Administrative Office of the District Court.

III. Proposed Legislation in Massachusetts Relating to Mediation

Three bills relating to mediation have been filed for consideration by the 1991 Massachusetts legislature (see III-A,-D, and -F):

(1) The Community Mediation Trust Fund Bill (see III-A), filed in 1990, has been refiled by Representative Kenneth M. Lemanski for consideration in 1991.

(2) Also, the Restriction of Mediation Bill (see III-B) and Divorce Mediation Pilot Project Bill (see III-C), both filed in 1990, were combined and refiled by Representative Barbara E. Gray for consideration in 1991 (see III-D). In view of the fact that the Abused Persons Protection Act passed in 1990 (see II-J) contains broad language limiting mediation in domestic abuse cases (no court can compel mediation in a case involving complaints for protective orders against domestic abuse), Representative Gray's office reports that she is considering dropping the portion of the 1991 bill restricting mediation in domestic abuse cases.

(3) Chief Justice Paul J. Liacos of the Supreme Judicial Court filed a Court Reform Bill (Act to Improve the Administration of Justice in the Commonwealth) (see III-F) for the 1991 legislative session, which contains a paragraph [Section 9 (7)] relating to procedures to assign matters to non-judges including mediators. The Senate Clerk reports that the Court Reform Bill will be sent to the Judiciary Committee.

In addition, the Attorney General's Office has reported plans to file the School Mediation Fund bill in 1991 (see III-G).

Out of the seven mediation bills considered in 1990, four passed [see II-C (technical amendment), -D (technical amendment), -H and -J], and three failed (see III-A, - B and -C). The substance of all three of these 1990 bills is included in 1991 bills (see III-A and -D), and actually, a different form of one of the failed 1990 bills (see III-B) passed (see II-J).

At least two mediation bills were previously considered in 1987 (see III-C and -E) which failed to pass. One of these 1987 bills provided for a dispute resolution program fund, within the office of the chief administrative justice of the trial court, to promote and evaluate programs designed to resolve civil disputes more efficiently, at less cost, and with greater satisfaction to the parties. This dispute resolution program provision was included in three different 1987 bills (HB 5292, HB 5883, HB 6060). After passing the House (HB 6060), it was sent to the Senate Ways and Means Committee, where it died and was not subsequently refiled. The other 1987 bill, which involved a divorce mediation pilot project (see III-C), was filed in the same form in 1988, 1989 and 1990. It has been filed again in 1991 along with a bill limiting mediation in domestic violence cases (see III-D).

The following is a summary of the proposed legislation:

Bill Number**	Topic
A) HB 5653 (1990) HB ____(1991) [Bill # not yet assigned]	**Community Mediation Trust Fund** (Amends Mass. Gen. L. ch 218 by adding s. 43F, amends Mass. Gen. L. ch 221A, s. 12, s. 4C. Provides for a $2.50 surcharge to small claims filing fees to fund community mediation services).
B) HB 5711 (1990)	**Restriction of mediation in domestic violence cases** (Amends Mass Gen. L. ch. 209A. Restricts mediation where protective orders are requested in domestic violence cases. See Section II-J above for related legislation passed in 1990 and Section III-D below for refiling of the same bill with HB 4086 (1990).
C) HB 5133 (1987) HB 2949 (1988) HB 3984 (1989) HB 4086 (1990)	**Divorce mediation pilot project** (Proposed amendment of Mass. Gen. L. ch. 208, s. 1C., establishing 3 year pilot mediation project to demonstrate and explore the benefits of mediation for divorcing couples and their children).
D) HB_____(1991) [Bill # not yet assigned]	**Restriction of mediation in domestic violence cases and authorization for divorce mediation pilot project** (Combining HB 5711 (1990) and HB 4086 (1990) as described above in B and C).
E) HB 5292 (1987) HB 5883 (1987) HB 6060 (1987)	**Dispute Resolution Program Fund for ADR study by trial court.** (Proposed amendment of Mass. Gen. L. ch. 211B, s. 9,- establishing a dispute resolution program fund to evaluate dispute - resolution programs and the chief administrative justice of the trial court would determine which programs are funded).
F) SB 718 (1991)	**Act to Improve the Administration of Justice in the Commonwealth (including authority to establish procedures to assign matters to mediators)** (Section 9, subsection 7 of this Court Reform Bill amends Mass. Gen. L. ch. 211, s. 3 (1988) to provide authority for the Chief Justice of the Supreme Judicial Court or his designees to perform certain functions, including establishing procedures for the assignment to court personnel, including mediators, of matters coming before the trial court which do not warrant a judge. Subsection 7 further authorizes these mediators to review, hear, and dispose of such matters subject to judicial review.
G) _B ____ (199_)	**School Mediation Fund** - *to be filed* (Modeled after the Local Consumer Aid Fund to provide monies to train students as mediators in disputes arising in school among students. Provides for fund of $140,000.00 which would fund mediation in 7 Massachusetts schools).

**Copies of cited legislative bills are available upon request from the author or the District Court Administrative Office.

IV. Remaining Legal Issues Concerning Mediation in Massachusetts

To thoroughly discuss the legal issues relating to mediation in Massachusetts would require in depth analysis far beyond the scope of this report, however, some of the primary issues will be highlighted. Among the remaining legal issues concerning mediation in Massachusetts are:

A) Is mediation constitutional?
B) Is a mediated agreement legally binding on the parties?
C) Is a mediator a mandated reporter of child abuse?
D) Are there or should there be limitations to confidentiality in mediations?
E) Does mediation present statute of limitation problems?
F) Do mediators have any liability to disputants, and if so, what is it?

A) Is Mediation Constitutional?

Questions have arisen about whether mediation is constitutional, particularly where cases are referred to mediation by the courts or where an attempt at mediation is mandated by statute as a prerequisite to trial. *See* e.g., Fla. Stat., Secs. 44.1011-44.108 (1990) (amending Florida ADR Act of 1987 and authorizing county and circuit judges to refer civil and family cases to mediation); Title 4 M. R. S. A., Sec. 18 (1980) (establishing the Maine Court Mediation Service to provide for mediation through court mediators as independent contractors in the Superior and District Courts of Maine); Title 19 M. R. S. A., Secs. 214, 581, 752 (1984) (making mediation mandatory in domestic relations cases involving minor children in Maine); Title 9 M. R. S. A., Secs. 636, 665 (granting court discretion to order mediation in non-mandatory domestic relations cases in Maine).

Constitutional issues relate to:

1) Due process (Fifth and Fourteenth Amendments to the U. S. Constitution),
2) Right of trial by jury (Seventh Amendment to the U. S. Constitution),
3) Right to counsel (Sixth Amendment to the U. S. Constitution), and
4) *Miranda* rights (Fifth and Sixth Amendments to the U. S. Constitution).

In addition, there are questions concerning the separation of powers, equal protection, access to the courts, and federal-state relations. *See* D. Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues,* 68 Or.L.Rev. 487 (1989): D. Golann, *Does Mandatory ADR Constitute Denial of Constitutional Right to Jury Trial?*, 3 BNA ADR Report 76 (March 2, 1989); D. Golann, *Does Mandatory ADR Constitute a Denial of Due Process and Access to the Courts?*, 3 BNA ADR Report 113 (March 30, 1989).

1) Due Process

The Fifth and Fourteenth Amendments provide that no person can be deprived of life, liberty or property without due process of law. It has been asked whether parties are entitled to the same due process guarantees in mediation they have in adjudication through the courts. By its very nature, mediation is an informal, confidential process that excludes the formal rules of evidence and procedure in order to encourage settlement by allowing parties to more freely discuss their case without the risk that what they say will be used against them in the adversarial system. Some argue that disputants in mediation should be protected by the courts with rules of evidence and procedure, while others argue that the purpose of these safeguards is to protect parties from being prejudiced by a judge deciding their case and these are unnecessary in mediation because the parties are in control of the decision making.

Also. certain procedural safeguards are built into mediation. Sessions are confidential and any agreement reached must be voluntary; disputants receive notice of the mediation session, have the right to be heard and are guaranteed the right to an impartial hearing officer. As a further procedural safeguard, participants in mediation have the option of returning to court to let the judge hear their case if they do not reach a mutually agreeable resolution. On the other hand, it has been argued that the voluntariness and confidential nature of mediation is questionable, particularly where one party is significantly more powerful, knowledgeable, or less emotional and the other party allows himself or herself to be coerced into agreement.

Whereas mediation relies more on self-determination by the parties, litigation relies on judges and attorneys to insure a fair hearing and resolution. Whether one process is more or less procedurally fair than the other may depend on whether the parties are more comfortable with taking care of themselves or depending on others to take care of them. From the perspective of the third party neutral, it is the role of both the judge and the mediator to insure impartiality and evenhanded treatment of the parties and that all parties have equal opportunity to be heard. In addition to neutralizing power imbalances procedurally, the mediator is required to ensure that the parties act with full information and understanding in making their decisions. *See generally* Bush, *supra*, at 253; J. Folberg & A. Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation (1984).

A Massachusetts Bar Association Task Force on Alternative Dispute Resolution Mechanisms applied a more technical due process analysis in concluding that the Boston Municipal Court Mediation Program did not violate the Constitution. R. McGinness & R. Cinquegrana, *Legal Issues Arising in Mediation: The Boston Municipal Court Mediation Program,* Mass. L. Rev. 123 (Fall 1982). The voluntary Boston mediation program used local attorneys trained in mediation and allowed the parties to return to court if settlement was not reached in mediation. First, the Task Force found that mediation in this program did not violate due process because it did not constitute state action and thus did not trigger the applicability of the Fifth and Fourteenth Amendments. In order to constitute state action, there must be 1) "the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible," and 2) the party depriving one of the privilege must be a state actor. *Id.* at 127.

It was concluded that even if the mediation program had constituted state action, there was no constitutionally protected liberty or property interest created by the mere prospect that one's case may be referred to mediation by the court. Similarly, procedural fairness was not required in the withdrawal of the benefit to participate in mediation (after being referred) because the interest in mediation is viewed as insignificant if the disputant is free to return to the judicial process. Furthermore, the benefit of mediation is directly related to the absence of the formal procedural safeguards. Likewise, if there is a problem with compliance with the mediated agreement, there is no due process violation because as a practical matter, the result is renewed attention by the court to the dispute.

Likewise, Professor Dwight Golann, of Suffolk University Law School, Boston, recently noted that persons required to participate in non-binding dispute resolution (*e.g.*, mediation referred by a judge or mandated by statute) might complain that the expense, delay, disclosure, and other burdens of participation in in alternative dispute resolution (ADR) violate due process. He concluded that mere participation in ADR is not likely to amount to the "significant" deprivation of a liberty or property interest that is ordinarily required to invoke the Due Process Clause. D. Golann, *supra*, at 114-15 (March 30, 1989) (citing *Bodie v. Connecticut*, 401 U.S. 371 (1971)). Therefore, comparing mediation with

traditional adjudication, which often requires parties to submit to lengthy, costly discovery, compelled participation in mediation should not raise serious due process concerns. *Id.*

2) Right of Trial by Jury

One of the most serious challenges to the constitutionality of mediation, particularly in the case of mandatory or court referral programs, is raised by the issue of whether litigants' rights to a jury trial are impaired. While the Chief Administrative Justice was authorized by Massachusetts statute in 1989 to establish rules for a mandatory nonbinding alternative dispute resolution program within the trial court, no such program has been established. *See* Mass. Gen. L. ch. 211B, s. 19 (1990) (technical amendment to 1989 statute). It is generally the practice in Massachusetts courts using mediation to refer cases to mediation with the consent of the parties. *See* Mass. Gen. L. ch. 218, s. 22 (1989); Standard 6:01, Standards of Judicial Practice, Small Claims, Mass. (1984). An exception may be found in divorce suits where cases of two hours or more are referred by presiding judges to Family Service Officers for mandatory mediation . *See* Interim Report of The Special Commission Relative to Divorce, October, 1986, p. 16-17, 78 (Senator Michael LaPresti, Jr. & Representative Barbara E. Gray, Chairmen). This exception, however, has been limited by Massachusetts legislation passed in 1990 which prevents courts from compelling mediation in domestic cases involving complaints requesting protective orders for abuse (see III-J above).

If a mandatory mediation program were enacted in Massachusetts where parties were required to participate in mediation prior to trial of civil and non-abuse family cases, current court opinions in other jurisdictions support the constitutionality of such a program as long as parties are not ordered to settle their case in mediation. *See Department of Transportation v. City of Atlanta, Ga.*, 380 S.E.2d 265 (Ga. 1989) (Trial court may refer to mediation a dispute between the Georgia Department of Transportation and private landowners concerning the taking of certain property, but order must be clear that settlement is not required); *Kurtz v. Kurtz*, 538 S.2d 892 (Fla. 4th DCA 1989) (Trial court's postdissolution order deferring judicial consideration of former husband's motions for contempt and visitation schedule pending mediation did not unconstitutionally divest husband of his right to be heard in court on his motions). *See also Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266 (6th Cir.) (Under hybrid "mediation" system in Michigan for diversity cases, similar to arbitration, where three "mediators" issue an award and the parties are penalized for failing to accept an unanimous verdict, local court rule referring money damage case to "mediation" before trial was held constitutional).

The Seventh Amendment to the United States Constitution ("Constitution") does not apply to litigation in state courts, but the constitutions of 48 states, including Massachusetts, contain similar language providing the right to jury trial in suits at common law. *See* D. Golann, *supra*, at 76. Litigants are entitled to a jury trial if their claim would have received a jury trial under the common law of England at the time the Constitution was ratified. Statutory claims such as divorce and child custody disputes, workers' compensation actions, and no-fault automobile statute claims do not carry jury rights, thus mandatory mediation in these cases would not violate jury guarantees. *Id.*

In claims carrying jury rights, nonbinding processes such as mandatory participation in mediation should withstand the reasonableness test applied by the courts in such cases, as long as jury trials remain available to persistent litigants following mediation. *Id.* at 77 [citing *Colgrove v. Battin*, 413 U.S. 149, 179 (1973) (Even if procedural innovations delay or burden a litigant's access to a jury, they satisfy the reasonableness standard if jury trials are available to persistent litigants); *Ex Parte*

Petersen, 253 U.S. 300, 309-10 (1920) (Auditor could be appointed to review accounts, identify undisputed facts, conduct hearings, evaluate the credibility of witnesses, and prepare report in creditor claim for unpaid bills); *Capital Traction Co. v. Hof,* 174 U.S. 1 (1899) (Requiring litigants to go through a quasi-trial before a justice of the peace and then post a bond as a precondition to obtaining access to a jury did not violate the Seventh Amendment)]. Considering that in litigation, judges can mandate expensive, time-consuming discovery, settlement negotiations, and cost-shifting, including award of attorney's fees, a nonbinding ADR process such as mediation should be constitutional, even if it is mandatory. *Id.* at 78-79.

3) Right to Counsel

While the Supreme Court has recognized a right to counsel in a "criminal prosecution" or a "critical stage" of such a prosecution, mediation lacks all the aspects of a criminal proceeding, such as state involvement, evidentiary rules, prosecutorial context and binding decision-making by a third party. Therefore, it was concluded by the Massachusetts Bar Association Task Force that no Sixth Amendment right to counsel would be affected by mediation. McGinness & Cinquegrana, *supra,* at 129.

4) *Miranda* Rights

The prospective criminal defendant participating in mediation does not need advisement of his self-incrimination (Fifth Amendment) and presence of counsel (Sixth Amendment) rights because mediation does not involve custody of the defendant and *Miranda* warnings are only required where a defendant is placed under custody (*e.g.,* arrest). McGinness & Cinquegrana, *supra,* at 129.

B) Is a Mediated Agreement Legally Binding upon the Parties?

Mass. Gen. L. ch. 211B, s. 19 (1990) provides that the parties to a dispute "shall not be bound by the results" of the mandatory alternative dispute resolution program established by the administrative justice. If this statute were interpreted to allow parties to a mediated agreement to not be bound after they had validly entered into a settlement agreement, it would defeat the purpose of mediation. Another possible interpretation of the statutory language is that participants in mediation are not required to settle their case in mediation, and in the case where a voluntary, mutually agreeable settlement is not reached, participants are not bound by the results and can proceed to trial.

Where the parties do agree to a settlement, it would seem logical that they should be able to enforce a mediated agreement as an executory contract. Traditional law looks favorably on settlement agreements, and a mediated settlement agreement should be subject to the requirements of contract law (*e.g.*, offer, acceptance, consideration by the parties, clear, unambiguous terms, and no fraud, duress or illegality) in determining whether the parties are bound.

Another alternative to resorting to the judicial process for enforcement of a mediated agreement would be returning to mediation, particularly if the mediated agreement failed to meet the legal requirements for becoming a contract. Also, if a case is on file in the court at the time of mediation, parties can agree in mediation to the entry of a judgment or a continuance of the case to allow court monitoring until the agreement has been performed. *See generally* McGinness & Cinquegrana, *supra*, at 132-33.

C) Is a Mediator a Mandated Reporter?

Mass. Gen. L. ch. 119, ss. 51A, B (1989) requires certain persons, including

workers in health-related, counselling and school facilities to report conditions giving reasonable cause to believe that a child under eighteen is suffering serious physical or emotional injury from abuse. While the statute does not expressly include mediators as mandated reporters, it is uncertain whether the legislature intended their inclusion, or if not, whether mediators should be added to the list of mandated reporters. In the case of mediators with community mediation programs performing family mediations on a contract basis for the Department of Social Services, including CHINS (Child in Need of Services) and potential CHINS cases, a mediator could be in the position to become aware of child abuse which he would be required to report if he were a mandated reporter. If a mediator is also a counsellor (or a member of another profession included in the list of mandated reporters), she or he would probably be required to report abuse cases learned about in mediation. The mediator is risking violation of his oath of confidentiality and loss of trust from the disputants by reporting abuse learned about in mediation, however, there may be an overriding interest in the protection of injured children which would favor all mediators in Massachusetts reporting abuse.

D) Are There or Should There Be Limitations to Confidentiality?

Fundamental to mediation is the concept that parties who feel free to explore all aspects of a dispute will be better able to construct lasting settlements than those who are constrained by rigid rules or fear that such open discussions will be used in the adversarial system to their detriment. Thus to encourage candor, communications and work product relating to a mediation are deemed confidential in Massachusetts.

Mass. Gen. L. ch. 233, s. 23C (1985) provides broad protection of all memoranda and other work product prepared by a mediator (as defined in the statute, see Section V. C below) and all communications "made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person." Such work product and communications are confidential and not subject to disclosure by anyone in any judicial or administrative proceeding. The statutory language suggests that everyone is disqualified from testifying regarding work product and communications relating to a mediation. This section exempts mediation of labor disputes, which is covered under Mass. Gen. L. ch. 150, s. 10E, ch. 150E, s. 9 (1985) and focuses on the privilege (rather than disqualification) of the labor mediator not to reveal information acquired in a mediation at an administrative, civil or arbitration proceeding.

It has been suggested that confidentiality statutes for nonlabor disputes, such as the Massachusetts statute, should allow disclosure of communications necessary to enforce a mediated agreement or to prove breach of one party's obligations to another in the course of mediation (e. g., fraud, duress, mistake). Although there are no reported opinions on this issue, a Massachusetts court may imply such limitations even though not expressly provided for in the statute. These limitations would provide the protection needed by parties to insure enforcement of a valid mediated agreement and at the same time, should not jeopardize the positive benefits of confidentiality. *See Protecting Confidentiality in Mediation*, 98 Harv. L. Rev. 441, 459 (December, 1984).

E) Does Mediation Present Statute of Limitation Problems?

Complaints referred to mediation subsequently may be time-barred if the applicable statute of limitations runs during an unsuccessful mediation. The safest practice would be to file a complaint in court to avoid waiving legal rights. If a violation of the mediated settlement agreement falls outside the statute of limitations on the original action, such an

act will probably give rise to a new cause of action for breach of the settlement agreement. *See* McGinness & Cinquegrana, *supra*, at 132.

F) Do Mediators Have Any Liability to Disputants, and if so, What Is It?

Some states such as Florida provide immunity to court-appointed mediators in the same manner and to the same extent as judges. Fla. Stat., Sec. 44.107 (1990). The scope of duty of a mediator is controversial. *See Protecting Confidentiality in Mediation*, 98 Harv. L. Rev. 441, 453, n. 87 (1984). Colorado Revised Statutes, Section 13-22-306(2) (Supp.) provides that a mediator is liable for "willful or wanton misconduct." *Id.* It remains to be decided in Massachusetts what the standard of conduct for mediators is and whether mediators for the courts should be given judicial immunity.

V. Remaining Policy Issues Concerning Mediation in Massachusetts

Across Massachusetts, thirty-five mediation programs supervise over 1,000 trained volunteers. In 1989, these programs mediated over 3,500 cases with an 85 percent success rate, thus saving the state many thousands of dollars by significantly reducing the number of cases requiring hearing or trial. In order to further take advantage of the opportunity to streamline the court system, the following policy issues remain for consideration:

A) Should Use of Mediation in Courts be Expanded and How?

In 1982, Chief Justice Warren Burger urged greater use of alternatives to the judicial system for dispute resolution, stating:

> The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about.

W. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

Proponents of alternative dispute resolution procedures such as mediation "don't advocate that it replace the court system or be a panacea." Rather, the goal is to gain a "better understanding of what belongs in the courts" and what is better resolved by mediation and other ADR techniques. *See Controlling Litigation Costs with a Neutral Third Party*, The New York Times, September 23, 1990 (quoting Madeleine Croh, President, National Institute for Dispute Resolution). Considering the numerous benefits to mediation as described in Section I.B above and considering that parties unsuccessful in resolving their disputes in mediation retain the right to litigate their cases, it seems reasonable to encourage expanded use of mediation in Massachusetts.

While the quality of mediation in Massachusetts has always been a high priority, it is now possible to increase the number of mediations significantly and at the same time maintain and improve mediation quality. There are many qualified mediators in the Commonwealth trained through community mediation and private programs who are underutilized and available to mediate. The issue is whether the Legislature and the Courts are willing to expand the role of mediation in the courts where the vast majority of identifiable disputes are found.

1) How should mediation be defined?

If mediation is to be used extensively in the Courts, it could be helpful for the Massachusetts Legislature to enact legislation or the Courts to promulgate rules defining "mediation". None of the statutes relating to mediation expressly define mediation, so it is unclear what is meant by "mediation" under the different laws. Massachusetts General Laws, chapter 233, section 23C (1985) concerns nonlabor mediation and provides for confidentiality in mediations with a mediator meeting certain general qualifications. This confidentiality statute only defines mediation by the qualifications of the mediator rather than the process conducted by the mediator. See Section V. C. *infra.*

Other statutes involving mediation of various types do not even attempt to define "mediation". For example, Massachusetts General Laws, chapter 218, section 43E (1988) relates to mediation in the District Court; Massachusetts General Law, chapter 211B, section 19 (1990) involves civil court mediation in the trial court; Massachusetts General Laws, chapter 7, sections 4G and 51 (1991) involve mediation by the Office of Dispute Resolution in governmental administrative agencies, the courts and other areas of government. Other statutes concern labor mediation (e.g., Mass. Gen. L. ch. 150, s. 10A (1985); Mass. Gen. L. ch. 150E, s. 9 (1985); Mass Gen. L. ch. 23C, s. 1 - 4 (1981)), which may differ significantly from court mediation or private nonlabor mediation. Similarly, Massachusetts General Laws, chapter 166A, section 16 (1971) deals with mediation by the Community Antennae Television Commission, which also may be different from mediation in other circumstances.

"Mediation" in the Florida courts is defined as "a process whereby a neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable agreement." Fla. Stat., Sec. 44.301 (1990).

In practice, mediation in the Massachusetts' courts and community mediation centers is generally described by the Florida statutory definition. Massachusetts needs to formally adopt its own definition of mediation to clarify the mediation statutes on the books and to make the use of mediation more consistent throughout the Commonwealth.

2) What cases are appropriate for mediation?

In addition to defining "mediation", the Massachusetts Legislature might consider setting forth guidelines on what cases are appropriate for mediation. In determining what cases are appropriate for mediation, it is noteworthy that mediation is private and confidential. There is no written record of the process other than the mediated settlement agreement, which may become part of the court record in full or in part, or may not. Thus in private civil disputes where no public record is desired and there is no desire by the parties to establish case precedent, mediation is clearly feasible among parties having full information and understanding of the disputed matter .

In criminal matters, the state is prosecuting defendants on behalf of its citizens and it may be in the public interest to make the process public and involve a jury to apply public norms and establish case precedent. In practice, however, it is estimated that 95 percent of the criminal cases are resolved privately through plea bargaining rather than trial. Furthermore, there may be much to gain from using mediation as another "private" method of resolving criminal complaints. Some of these benefits were expressed by the United States Department of Justice as follows:

> Society cannot and should not rely exclusively on the courts for the resolution of disputes. Other mechanisms may be superior in a variety of controversies. They may be less expensive, faster, less intimidating, more sensitive

> to disputants' concerns, and more responsive to underlying problems. They may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard, and fulfill a need to retain control by not handing the dispute over to lawyers, judges, and the intricacies of the legal system.

Paths to Justice: Major Public Policy Issues of Dispute Resolution, U. S. Department of Justice (1984).

Because there are many factors involved in determining the appropriateness of a case for mediation, it may be best to grant judicial discretion to refer cases to mediation rather than mandating mediation in all cases as a prerequisite to trial. In addition to local guidelines from mediation committees in the various Florida circuits, the Florida Supreme Court has excluded the following cases from referral except where all parties have petitioned for mediation: appeals from filings of administrative agencies, bond estreatures, forfeitures of seized property, habeas corpus and extraordinary writs, bond validations, declaratory relief, and other matters as may be specified by administrative order of the chief judge in the circuit. Fla. R. Civ. P. 1.710 (b).

Through a dialogue between judges, mediators and other mediation professionals concerning these and other factors determining the appropriateness of mediation, a checklist could be developed for judges to use in referring cases to mediation.

3) Alternative methods to expand mediation

Along with defining mediation and establishing guidelines for determining when mediation of court cases is appropriate, consideration of alternative methods of expanding mediation in the Commonwealth is needed. The most conservative policy would be to provide mediation in the courts on a voluntary basis only, where the parties take the initiative to arrange for mediation. On the other extreme, mediation could be mandatory for all court cases as a prerequisite to the right to trial. (e.g., Maine's mandatory mediation in certain domestic relations cases). Alternatively, the court could have the discretion to refer or order cases to mediation and give the parties the right to object to mediation (*e.g.*, Fla. Stat. Secs. 44.1011-44.108 (1990); Fla. R. Civ. P. 1.700 (a) - (c) (providing for motion to dispense with or defer mediation)). Another possibility is that courts could simply suggest that the parties consider mediation and it would be entirely within the parties' discretion whether or not they would try the process. A variation of suggesting mediation would be to have a mandatory program educating parties about the mediation process so they could make a more informed decision about whether or not to mediate.

The 1990 Massachusetts Legislature addressed this policy issue with regard to domestic cases involving protective orders for abuse (see II-J above). The Act Relative to Abused Persons (Acts of 1990 ch. 403, s. 3) limits mandatory mediation and referral of parties to mediation by the courts without agreement of the parties. The process of sending other types of cases to mediation has not yet been fully established by the Massachusetts Legislature and Courts.

As discussed above in Section I.A, in contrast to binding arbitration or adjudication, where a third party imposes a binding decision on the parties, the parties are only bound by a decision reached in mediation if they mutually and voluntarily agree to settlement. It can be argued that requiring parties to meet to discuss settlement with a mediator is coercive. It, however, seems no more unreasonable than the requirement of a pretrial conference where the parties are required to meet to narrow the issues and discuss settlement. Just as in a mandatory pretrial conference, the parties are not required to agree on any issues in a mediation.

There seems to be growing sentiment that official "encouragement" to attempt mediation is necessary to expose more parties to its benefits. A domestic relations judge in a San Francisco superior court found that prior to mandatory mediation, he heard five to fifteen hearings each morning, compared with five hearings a year after mandatory mediation. *See* Lawrence Freedman, *Legislation on Dispute Resolution*, American Bar Association (Washington, D.C., 1984). When a judge or magistrate refers a case to mediation, it avoids the problem of one party appearing weak because they have suggested mediation. Also, courts have the opportunity to educate disputants about mediation. Since many disputants do not even know what mediation is, it is less likely that they would take the initiative to mediate without referral by the court.

If mediation is to expand to facilitate settlement of cases and help streamline the courts in Massachusetts, the most efficient and effective way to accomplish this result is by court referral of cases to mediation. The Florida ADR Act of 1987 authorized judges to order mediation in civil and family cases, and phenomenal growth in mediation in Florida has resulted. From 1988 to 1989, the number of court based mediations in Florida increased from 28,840 to 52,380. *See Florida Mediation/Arbitration Programs: A Compendium*, Florida Dispute Resolution Center, p. vii (July, 1990). Comparing the 3,500 cases mediated in Massachusetts in 1989 by community mediation programs and a much smaller number of mediations in three Massachusetts Superior Courts (Suffolk, Middlesex and Hampden), it is easy to see the tremendous potential for mediation as an effective case management tool in Massachusetts if courts in the Commonwealth routinely referred cases to mediation before trial.

4) Is legislative authority for mediation referral sufficient?

It is unclear whether the Chief Administrative Justice will take the lead under the broad authority granted him by Mass. Gen. L. ch. 211B, s. 19 (1990) to establish a mandatory nonbinding alternative dispute resolution program for civil actions in the trial court (subject to approval by the Supreme Judicial Court), or whether more specific direction is needed from the Legislature. The Court Reform Bill filed in 1991 (see III-F), amending Mass. Gen. L. ch. 211, s. 3, authorizes the Chief Justice of the Supreme Judicial Court to establish procedures for the assignment of cases not warranting the use of a judge to court personnel, including mediators. This legislation would require the availability of court personnel to mediate and may be more costly and less efficient than the referral of mediations to qualified independent contractor mediators, as is the practice in the Suffolk and Middlesex Superior Courts of Massachusetts, the Florida courts, and the Maine courts.

Likewise, it is unclear whether small claims courts will expand the use of mediation with community mediation programs under the authority granted clerk/magistrates to mediate small claims cases. *See* Mass. Gen. L. ch. 218, s. 22 (1989); Mass. Gen. L. ch. 221, ss. 62B, 62C (1988). Even in the courts with mediation programs, use of mediation could be expanded by more magistrates and judges routinely educating disputants about mediation and suggesting it to the parties. Such an educational program could be introduced at conferences for judges and clerk/magistrates rather than relying on overworked judges, magistrates and clerk's office personnel to set up programs individually.

Additional statutory authority for mediation referral was just granted by the Office of Dispute Resolution (ODR) enabling legislation. Mass. Gen. L. ch. 7, ss. 4G, 51 (1991). The ODR is authorized to assist agencies and offices of the legislative, executive and judicial branches, as well as any political subdivision or public instrumentality created by the Commonwealth or any county, city or town, to improve the resolution of disputes that

arise within their respective jurisdictions. Similarly, the Department of the Attorney General has a Face-to-Face Mediation program and supports various community mediation and school mediation programs through funding and mediation training.

The Family Service Officers (FSO's) in the Probate and Family Court mediate domestic relations cases as one of a variety of assigned duties. Richard E. O'Neil, Assistant Chief Probation Officer with the Suffolk Probate and Family Court, reports that significant efforts are being made to improve mediation conditions and procedures for domestic relations cases, and he continues to work on procedures for making mediation available to all parties. FSO's are considered by some to be extremely competent mediators, especially considering the conditions under which they mediate. Others remain concerned that FSO's frequently have limited time to mediate, parties are sometimes pressured into agreement, and confidentiality can be impaired in cases where FSO's are requested to make recommendations to judges as well as mediate.

If the Divorce Pilot Project legislation passes (see III-D above), study of alternatives to improve the quality of domestic relations mediation, insure confidentiality to disputants, and make mediation available to all interested parties, might include consideration of: upgrading conditions for mediation by FSO's; using independent contractor mediators certified by the court, similar to those in the Suffolk and Middlesex, Massachusetts Superior Courts and in other states such as Florida and Maine; hiring specially trained court employee mediators with no conflicting duties; or a combination of the above alternatives so that government employee mediators and private contractor mediators work as partners. One possibility is that the FSO's and other employee mediators could mediate situations before the court requiring immediate relief, and the independent contractor mediators could mediate longer term issues requiring more time for consideration.

In conclusion, mediation in Massachusetts has developed in large part on a piecemeal basis rather than through comprehensive legislation that standardizes mediation throughout the Commonwealth. A major challenge to the Massachusetts Courts and Legislature in this decade will be enacting an efficient and effective plan for the expansion of mediation. This may be accomplished through a comprehensive program established by the Courts and the Legislature involving mediation case referral and education by judges and magistrates.

B) How Should Mediation Be Funded?

Part of the delay in the expansion of mediation in Massachusetts lies in the difficulties with funding mediation programs. If it were understood that mediation could significantly reduce the backlog in the courts as well as in administrative agencies and other areas of government dealing with the resolution of disputes, funding would be provided because the net effect would be a cost savings for the taxpayers and the disputants. If even a small amount of funding could be provided for structuring statewide mediation referral and education programs in the courts, such as the program the Chief Administrative Justice is authorized to establish for civil cases in the trial court [Mass. Gen. L. ch. 211B, s. 19 (1990)], mediation could expand more rapidly.

Once a statewide mediation program is structured, mediation could be self-supporting by: 1) funding mediation administration through filing fees and/or an administrative fees to the disputants; 2) using independent contractors and volunteers as mediators and charging disputing parties (other than in small claims cases) fees for mediation services to compensate mediators, with provision for parties unable to afford fees; and 3) providing mediator training pursuant to court-approved standards through

independent contractors who would charge fees paid by the trainees.

Such a statewide mediation program has been successfully implemented in the Florida trial courts through legislation and rules of procedure and includes provision for indigents in civil cases and disputants in family cases who are unable to pay fees. *See* Fla. Stat., Secs. 44.106, 44.108 (1990); Fla. R. Civ. P. 1.720 (g), 1.740 (c); *Mediation Training Program Standards*, Florida Mediation/Arbitration Programs: A Compendium, Florida Dispute Resolution Center, Appendix C (1990). Study of the Florida program as well as mediation programs in other state courts could be helpful to the Commonwealth in developing and expanding its mediation program. *See generally* S. Keilitz, *A Court Manager's Guide to the Alternative Dispute Resolution Database*, St. Ct. J. 24 (Fall 1990).

HB 5653 (1990) [see Exhibit II-A], which has been filed for consideration by the Massachusetts Legislature in 1991, proposes the establishment of a Community Mediation Trust Fund through a $2.50 surcharge to small claims filing fees to fund community mediation services. This legislation supplements private funding for the administration of volunteer community mediation programs which mediate small claims matters. Due to the loss of significant funding sources for community mediation programs, the Community Mediation Trust Fund is essential to the continuation and growth of mediation of small claims matters.

Similarly, funding of mediation services for other court matters may also be accomplished through levy of a certain amount of the filing fees for mediation. For example, Fla. Stat. 44.108 (1990) provides for funding of mediation in county and circuit courts by levy of up to $5.00 on any circuit or county court proceeding and up to $45.00 on any petition for a modification of a final judgment of dissolution. By funding through fees, mediation in Massachusetts can be largely self-supporting and will not require additional funding from an overextended state budget.

C) Should the Commonwealth Promulgate Standards and Licensing Certification Requirements for Mediators?

First of all, it should be decided whether standards and licensing certification requirements are appropriate for mediators in Massachusetts. Then it must be decided if mediator standards and certification should be undertaken by the Commonwealth, and if so, whether the Commonwealth should regulate private mediators or only court-appointed mediators and mediators acting on behalf of another governmental branch, agency, political subdivision or public instrumentality of the Commonwealth.

Arguably, the market will determine who is a qualified mediator in the private sector. Yet it can also be argued that allowing unqualified, unethical mediators to mediate is a poor reflection on mediation as a profession. On one hand, standards and certification could be a guide for mediators, helpful to the public in determining who is a qualified mediator and a revenue source for the Commonwealth if licensing fees were involved. On the other hand, standards and certification could also serve as a bureaucratic waste and a method of limiting the supply of qualified mediators offering their services to the public, thus possibly raising the cost of mediation. Also, rather than being helpful, licensing could creating a haze over the public if the licensing certification standards did not accurately and fairly reflect the qualifications and conduct of effective, ethical mediators.

Also, it can be difficult and a highly subjective task to measure the effectiveness of mediators. *See generally* B. Honoroff, D. Matz, and D. O'Connor, *Putting Mediation Skills to the Test*, 6 Negotiation Journal 37 (Jan. 1990) (describing selection process for mediators in Suffolk Superior Court); *Credentialing for Mediators*, 20 IJA Report 10 (Spring, 1988). In addition, if certification includes the requirement of mediation

experience, it may be extremely difficult for mediators to obtain at this early stage in the development of mediation. Whether or not experience were one of the formal certification requirements, apprenticeship programs could be most helpful in the development of quality mediation in Massachusetts. *See, e. g.*, Administrative Order, Supreme Court of Florida (effective October 1, 1990) (requiring court mediators to observe mediations and co-mediate under supervision for certification).

Currently, there are several statutes authorizing the establishment of standards for community mediators in the District Courts and mediators acting on behalf of the Office of Dispute Resolution. Massachusetts General Laws, Chapter 218, Section 43E (1988) provides that the District Court Community Mediation Advisory Board shall advise the administrative justice on matters pertaining to community mediation in the District Court Department, including the establishment of standards for persons and organizations engaged in community mediation. The Board, in conjunction with the District Court Department, is currently developing such community mediation standards. *See* A. Adrian & C. Brophy, *Comparative Analysis of Mediation Standards*, Office of the Chief Administrative Justice, Trial Court of the Commonwealth (1989).

Presently, the mediation confidentiality statute limits confidentiality of mediation communications to communications made in the presence of a mediator, defined as a person assisting in dispute resolution who has:

a) completed at least thirty hours of training in mediation, and
b)who either i) has four years of professional experience as a mediator, or
ii) is accountable to a dispute resolution organization in existence for at least three years, or
iii) has been appointed to mediate by a judicial or governmental body. Mass. Gen. L. ch. 233, s. 23C (1985).

Thus in order to guarantee confidentiality in the mediation process, a mediator must meet minimum training requirements and have either experience or be accountable to a dispute resolution organization or judicial or governmental body. The issue remains how these standards should be interpreted. For example, is <u>any</u> thirty hour mediation training adequate? Is <u>any</u> three year old dispute resolution organization appropriate? Is <u>any</u> kind of mediator professional experience sufficient?

As discussed previously, Massachusetts General Laws, Chapter 211B, Section 19 (1990) provides that the Chief Administrative Justice may establish and promulgate rules for mandatory alternative dispute resolution for civil actions within the trial court. Massachusetts General Laws, Chapter 7, Sections 4G, 51 (1990) similarly authorizes the Office of Dispute Resolution to establish standards for the selection, assignment, and conduct of persons acting on behalf of the Office in the resolution of disputes. The Office (formerly the Massachusetts Mediation Service) has participated in the selection of mediators in the Superior Court mediation programs. If mediation programs were established for the other Superior Courts and other courts besides the District Court in the Commonwealth, additional standards and certification requirements may be needed. To bring consistency to the standards and certification requirements throughout the Commonwealth, it would be helpful for the various organizations and governmental bodies to work together in developing them.

In summary, the above-described legislation has already begun the process of establishing standards and licensing certification for mediators appointed by the Massachusetts Courts or other Commonwealth governmental entities. While it would certainly seem ridiculous to make standards and certification so restrictive that students in Massachusetts had to be certified to mediate in the schoolyard, it does seem appropriate to

establish standards for court mediators, even if they are volunteers. Obviously different standards should be required for mediators of Small Claims cases, Superior Court cases, Family and Probate Court cases, and claims in various governmental agencies.

The issue remains whether strictly private mediators should be regulated by the Commonwealth. Various private dispute resolution organizations have already established mediator standards and certification requirements (e.g., Society of Professionals in Dispute Resolution, Academy of Family Mediators, and Massachusetts Council on Family Mediators, Inc.). It appears duplicative and costly at the present time to extend the Commonwealth's regulatory powers to license mediators working strictly in the private sector; however, standards and certification for mediators receiving court referrals and appointments seem reasonable.

Conclusion

As voiced by former Supreme Court Chief Justice Warren Burger: *For 200 years our country has made progress unparalleled in human history by virtue of a willingness to combine ancient wisdom with innovation and with what was long called "Yankee ingenuity."* Burger, *supra* at 277. The Commonwealth of Massachusetts has been at the forefront of America's progress through "Yankee ingenuity". It is now facing a new opportunity to determine the answers to remaining legal and policy issues concerning mediation in Massachusetts. How the Legislature and the Courts respond to this challenge will determine whether mediation is used to further increase the efficiency and effectiveness of dispute resolution throughout Massachusetts. With the Commonwealth's strong community mediation base as a resource, the potential through mediation for facilitating resolution of disputes and making adjudication more available for the cases where it is needed is phenomenal. Massachusetts legislators, judges, court administrators, mediators, attorneys and other dispute resolution professionals and policymakers, welcome to the challenge!

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